

No. 141, Original

In The
SUPREME COURT OF THE UNITED STATES

—◆—
STATE OF TEXAS,
Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,
Defendants.

—◆—
OFFICE OF THE SPECIAL MASTER

—◆—
**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* NEW MEXICO PECAN
GROWERS AND THE SOUTHERN RIO GRANDE DIVERSIFIED CROP
FARMERS ASSOCIATION IN SUPPORT OF DEFENDANT STATE OF NEW
MEXICO'S RESPONSES TO MOTIONS FILED BY TEXAS AND THE UNITED
STATES TO STRIKE NEW MEXICO'S COUNTERCLAIMS INVOLVING
THE 2008 OPERATING AGREEMENT FOR THE RIO GRANDE PROJECT**

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COMES NOW the Southern Rio Grande Diversified Crop Farmers Association (“SRGDCFA”), by and through its counsel of record Hennighausen & Olsen, L.L.P. (Alvin F. Jones), and pursuant to the Case Management Plan on file herein, number 3. Amici Curiae, the SRGDCFA seek leave of the Special Master to appear as *amicus* in this matter in support of the Defendant, State of New Mexico.

The SRGDCFA will be joining the New Mexico Pecan Growers in a joint response to the pending Motions for Summary Judgment on behalf of the state of New Mexico. The joint brief is attached as *Exhibit “A”* to this Motion.

The SRGDCFA is a New Mexico non-profit corporation formed in 2009 for the purpose of protecting the water rights of diverse farmers in the Rio Grande Project. SRGDCFA works to promote and protect the interests of diversified farmers in the Southern Rio Grande Valley of New Mexico, defined to include all diversified irrigated lands in the Rio Grande Project from Caballo Dam to the Texas state line.

SRGDCFA’s mission is to obtain equitable treatment of diverse farmers surface and groundwater rights as administered by the state of New Mexico and federal agencies. Diverse farmers presently cultivate approximately 30,000 acres of open ground in the New Mexico portion of the Project. The amount of land under cultivation by diverse farmers is directly influenced by the quantity of surface and groundwater available in any given year.

By reason of the Operating Agreement, diverse farmers have become much more reliant on groundwater. Diverse farmers support the concept embodied by the Operating Agreement of surface water offsets for pumping effects to the Rio Grande. Often, Rio Grande Project allotments for the New Mexico portion of the Project are meager, and only by groundwater pumping are diverse farmers able to sustain their crops. Diverse farmers grow a variety of crops consisting primarily of chili, onions, lettuce, corn, alfalfa and cotton.

It is the open ground land cultivated by diverse growers that is the focus of various following proposals as a part of aquifer management presently under consideration in the New Mexico portion of the Project. It is the goal of the SRGDCFA to protect the diverse crop farmers surface and groundwater rights throughout this process of development and implementation of adaptive aquifer management and the ultimate resolution of this original action.

The SRGDCFA advocates for an adaptive management response to climate variability such that no open ground farmer is forced to permanently leave the industry in response to the adaptive management of surface and groundwater resources.

SRGDCFA's members have a direct stake in this controversy and through its participation will contribute to a full and fair development of all issues involved. Given the unique circumstances of the SRGDCFA members participation of SRGDCFA as amicus is appropriate.

SRGDCFA respectfully requests leave to file the accompanying Brief in Support of the Defendant State of New Mexico.

Respectfully submitted this 28th day of February 2019 by:

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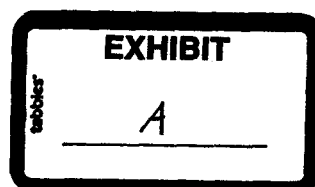


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INTERESTS OF *AMICI CURIAE*¹

Amicus Curiae New Mexico Pecan Growers and the Southern Rio Grande Diversified Crop Farmers Association (collectively “*Amici*”) are New Mexico non-profit entities formed in 2002 and 2009, respectively, to promote and protect the interests of farmers in the Southern Rio Grande Valley of New Mexico. Their several hundred members collectively irrigate approximately 60,000 acres of croplands and orchards within the Elephant Butte Irrigation District (“EBID”) using surface water released from the Elephant Butte Reservoir, the main storage reservoir of the Bureau of Reclamation’s Rio Grande Project (“Project”). Like their farming neighbors in the El Paso Valley, New Mexico’s farmers have drilled wells into the aquifers underlying the Rio Grande without interference or protest from their irrigation districts or the United States.

Although *Amici*’s members are legally entitled to use Project water delivered by EBID for irrigation, they have had to rely more-heavily on groundwater to meet their crops’ needs as a result of the Operating Agreement executed by the United States Bureau of Reclamation (“Reclamation”), EBID, and the El Paso County Water Improvement District No.1 (“EPCWID”) on March 10, 2008 (“Operating Agreement”). Under the Operating Agreement, EPCWID is allocated a greater share of Rio Grande water than it was historically allocated for the purpose of “offsetting” the effects to the river resulting from groundwater pumping in New Mexico. Soon after the Operating Agreement was executed, New Mexico experienced the severest drought of

¹ The Special Master’s Case Management Plan entered on September 6, 2018, recognizes that the New Mexico Pecan Growers is an *amicus curiae* in this original action and may file briefs pertaining to its factual or legal interests in response to any motion pending before the Special Master. The Southern Rio Grande Diversified Crop Farmers Association is filing a motion for leave to appear as *amicus curiae* for the purpose of filing this joint brief with the Special Master. No other person or entity other than the *Amici* has authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief.

record, further stressing available surface water supplies within the New Mexico portion of the Project. As a result, over the last several years New Mexico's farmers have had to pump more groundwater to "make up" the difference between the amount of water needed to irrigate their crops and the availability of Project water delivered by EBID.²

The farmers' rights to use groundwater from the aquifers underlying the Rio Grande have been legally established under New Mexico's prior appropriation doctrine as set forth in N.M. Const. art. XVI, §§ 2, 3 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water" and "[p]riority of appropriation shall give the better right."). Generally speaking, most of their groundwater wells were drilled after 1930, many years after construction of the Project. Thus, in terms of seniority for priority administration under state law, New Mexico considers the farmers' groundwater rights in these wells as "junior" in priority to the "senior" surface water rights served by EBID.³ The goal of the Operating Agreement was to allow EBID farmers to replace the reduction in surface water allocations with groundwater pumping. However, because the agreement was not approved or ratified by the state of New Mexico, the farmers' exercise of their "junior" groundwater rights remains vulnerable to curtailment through an intrastate priority call.

² To date, Reclamation continues to operate the Project in accordance with the provisions of the Operating Agreement.

³ New Mexico takes the position that the priority date for farmers' use of surface water is the same date as the United States' appropriation of water for the Project, recently determined by the state adjudication court as 1903. See, *New Mexico, ex rel. State Engineer, v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 (1996), SS-97-104 (United States' Interest), Findings of Fact and Conclusions of Law (April 17, 2017). It also takes the position that the date a groundwater well was drilled establishes the priority date for a farmer's groundwater rights. *Amici's* position is that the "relation back" priority doctrine established under *Templeton v. Pecos Val. Artesian Conservancy Dist.*, 332 P.2d 465 (N.M. 1958) provides the basis for a groundwater priority date equal to the historical full allotment of Project water to EBID farmers in the minimum amount of 3.024 acre feet per acre.

In an effort to address the recent water-supply and priority administration challenges in New Mexico, *Amici* began meeting in 2013 and, along with other major groundwater users in the Mesilla Valley, eventually formed the Lower Rio Grande Water Users.⁴ The groundwater user-group has worked with the New Mexico State Engineer, EBID and other stakeholders to develop methods by which Project water supplies continue to be protected, as they currently are under the Operating Agreement, and arrive at efficient administration and management mechanisms for groundwater in New Mexico. The user-group continues to make significant progress in implementing its Settlement Framework—a document that contains specific terms of agreement for intrastate priority administration and the means by which the group intends to arrive at an effective groundwater management proposal for the Lower Rio Grande.⁵ The Settlement Framework articulates the user-group’s goal of reaching consensus on intrastate priority administration so that New Mexico users can quickly respond as necessary to protect Project supplies. It also contains an acknowledgement that the Operating Agreement was intended to offset groundwater diversions in New Mexico, articulates support for its goal, but also recognizes that a better understanding of the technical issues underlying the Operating Agreement is essential so that any necessary revisions to the agreement can be made in a form that is fair and acceptable to all stakeholders, including New Mexico. Whatever its possible

⁴ The Lower Rio Grande Water Users consist of NMPG, SRGDCFA, City of Las Cruces, New Mexico State University, Public Service Company of New Mexico, and the Camino Real Regional Utility Authority. The group’s members represent the interests of those who, in total, pump up to 90% of the groundwater used in New Mexico below Elephant Butte.

⁵ The Settlement Framework is not a confidential settlement document. It has been attached as an exhibit to a filing made in Stream System Issue No. 107 in the Lower Rio Grande Stream System Adjudication in New Mexico’s Third Judicial District filed on August 14, 2017. The docket and filings can be accessed here: <https://lrgadjudication.nmcourts.gov/ss-97-107-pre-project-interests.aspx>. The Settlement Framework has since been publically distributed and can be accessed at a link located here: <https://www.newmexicopecangrowers.com/water-information/settlement-framework>

inequities, *Amici* recognize that the Operating Agreement is a mechanism by which the United States and the irrigation districts have been able to resolve their disputes over Project operations and, in that regard, it provides a useful framework for resolution of this original action.

STATEMENT

Amici's goal is to obtain equitable treatment of their members' surface and groundwater rights by federal and state agencies through the "ground up" development and implementation of aquifer management in New Mexico and through resolution of this original action. The initiation of this litigation is the best proof that the Operating Agreement provides no assurance that *Amici's* members can make up the difference of a reduced Project water allocation to New Mexico by pumping groundwater. New Mexico's Counterclaims involving the Operating Agreement comport with the Court's determination that the Reclamation contracts negotiated at the time the Compact was executed established New Mexico's apportionment of the Rio Grande below Elephant Butte Reservoir. Accordingly, as a party to the Compact, New Mexico has standing to protect its apportionment from the injuries it alleges arise from the Operating Agreement. Further, New Mexico is the only party in this original action that can address injuries to *Amici's* farmers resulting from increased groundwater pumping under the Operating Agreement. If they are to have any certainty as to the extent they can use groundwater for irrigation, any agreement that reduces Project supply in New Mexico must be approved by New Mexico. For these reasons, the Special Master should recommend to the Court that the motions filed by Texas and the United States to strike New Mexico's counterclaims involving the Operating Agreement be denied.

ARGUMENT

- A. New Mexico's Counterclaims involving the Operating Agreement comport with the Court's determination that the Downstream Contracts established New Mexico's apportionment of the Rio Grande below Elephant Butte Reservoir.

Amici acknowledge and appreciate that the Operating Agreement was executed in good faith to resolve long-standing disputes over Project operations. Accordingly, the parties to the agreement have staunchly defended it. Even now the United States moves the Special Master to find that New Mexico has no standing to assert that the Operating Agreement has reduced allocations of Project water to New Mexico because New Mexico is not a party to the Operating Agreement and is not entitled to "allocations" of Project water under the Compact. *See, e.g.*, United States' Memorandum in Support of Judgment on the Pleadings Against New Mexico's Counterclaims ("US Memo") at 27. However, its argument wholly ignores the Court's interpretation of the Compact as incorporating the Project and the water-supply and repayment contracts the United States "simultaneously negotiated" with the irrigation districts (the "Downstream Contracts").⁶ *See Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018). In finding that "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts," the Court reasoned that the equitable apportionment of the waters of the Rio Grande was achieved through the Downstream Contracts "which are themselves essential to the fulfillment of the Compact's expressly stated purpose." *Id.* at 959.

⁶ The Court describes the Downstream Contracts as follows:

In the first set of agreements, the federal government promised to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas. In turn, the water districts agreed to pay charges in proportion to the percentage of the total acres lying in each State—roughly 57% for New Mexico and 43% for Texas.

138 S. Ct. at 957.

The Court's reasoning puts the new allocation procedures under the Operating Agreement squarely at issue in this original action. Whether the division of Project water between EBID and EPCWID is considered an "allocation" under federal reclamation law is of no consequence. The Court has determined that the "certain amount of water to be delivered to Texas" under the Downstream Contracts constituted the Compact's equitable apportionment of Rio Grande water below Elephant Butte Reservoir to Texas and part of New Mexico. *See*, 138 S. Ct. at 959. If Texas is now delivered more than its share of Project water under the allocation procedures in the Operating Agreement, as New Mexico alleges, it follows that New Mexico has shown sufficient injury to its apportionment under the Compact for the Court to hear its claims.

The positions advanced by Texas and the United States puts New Mexico, and its farmers, in a no-win situation. Farmers within EBID have no choice but to live with the reduced allocations of Project water under the Operating Agreement and "make-up" reduced surface supplies with groundwater. In turn, increased groundwater pumping impacts the river's ability to efficiently deliver Texas its share of the Rio Grande. If New Mexico has no right under the Compact to approve the Operating Agreement's change to allocations of Project water to EBID, it also has no say when such changes negatively impact the river's ability to get Texas its share of water. This argument requires the Court to believe that New Mexico knowingly agreed to relinquish any benefit of its apportionment under the Compact and, instead, agreed to assume only the *liability* for potentially unavoidable short falls to Texas *caused by Project operations*. Clearly, this cannot be the deal New Mexico struck in 1939 when it relied on the Downstream Contracts to establish its apportionment of the Rio Grande below Elephant Butte Reservoir.

- B. New Mexico is the only party in this original action that can address any injuries to New Mexico's farmers resulting from the Operating Agreement.

EBID is not a party to this original action, yet the United States stresses that EBID claims no injury under the Operating Agreement. US Memo at 28. Regardless of whether EBID alleges injury to *its* interests, each of its members has an individual interest in any reduction of surface water supply because they must replace it with groundwater. Using more groundwater results in increased operational costs associated with pumping greater volumes of water, drilling and maintaining deeper wells, and managing increased soil salinity. New Mexico, in its role as *parens patriae*, is the only party to this original action that can address such injuries arising from the Operating Agreement.

Further, if EBID farmers are to be provided assurance as to their rights to use groundwater in the future, any agreement for Project operations that purports to reduce surface allocations for the purpose of offsetting the effects of using groundwater, such as the Operating Agreement, will need New Mexico's consent.⁷ Farmers in EBID currently have no choice but to live with the reduced allocations of their "senior" rights to use Project water under the Operating Agreement. At the same time, their "junior" groundwater rights are subject to priority administration by the New Mexico State Engineer who has exclusive authority to administer groundwater within the state and the duty to ensure that New Mexico is in compliance with the Compact. *See, e.g.*, N.M. Stats. Ann. § 72-2-9.1 (2003) (providing "the need for water administration is urgent, compliance with interstate compacts is imperative and the state engineer has authority to administer water allocations in accordance with the water right priorities"). New

⁷ *Amici* do not contend that New Mexico must approve all Reclamation contracts that bear on Project matters. However, this is an exceptional case where the Operating Agreement's reallocation of water across the state line brings it within the province of the Compact and its incorporation of the Downstream Contracts.

Mexico must agree to administer farmers' groundwater rights in accordance with the underlying intent of the Operating Agreement. Otherwise, their use of groundwater for irrigation remains vulnerable to curtailment through an intrastate priority call. Plainly, *Amici* have a genuine and fervent interest in New Mexico's approval of any operating agreement that reduces Project supply in New Mexico in exchange for increased groundwater pumping.

CONCLUSION

The Court has determined that the Downstream Contracts established the apportionment of the Rio Grande below Elephant Butte Reservoir to Texas and part of New Mexico. New Mexico alleges Texas is now delivered more than its share water under the allocation procedures in the Operating Agreement, showing sufficient injury to its apportionment under the Compact for the Court to hear its claims. New Mexico's participation on matters involving the Operating Agreement in this original action is essential to protecting *Amici's* member's dual interests in using both surface water and groundwater for irrigation in New Mexico. Accordingly, the Special Master should recommend to the Court that the motions filed by Texas and the United States to strike New Mexico's counterclaims involving the Operating Agreement be denied.

Respectfully submitted this 28th day of February, 2019 by:

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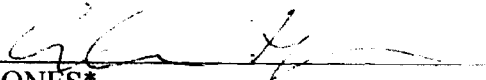
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***AMICUS CURIAE* SOUTHERN RIO GRANDE DIVERSIFIED
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CERTIFICATE OF SERVICE**

This is to certify that on the 28th day of February 2019 I caused a true and correct copy of the

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STRIKE NEW MEXICO'S COUNTERCLAIMS INVOLVING THE 2008 OPERATING
AGREEMENT FOR THE RIO GRANDE PROJECT**

to be served by e-mail upon all counsel of record and interested parties on the
Service List attached hereto.

Respectfully submitted this 28th day February 2019.



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